

TANNENBAUM HELPERN SYRACUSE & HIRSCHTRITT LLP

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April 1, 2013

VIA ELECTRONIC MAIL

The Honorable Paul A. Engelmayer
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007-1312

Re: *Goureau, et al. v. Goureau, et al.*
Civil Action No. 12-6443

Dear Judge Engelmayer:

We represent the Defendants in the above-captioned action. Plaintiffs have filed a motion for leave to amend their complaint (ECF No. 39), and have provided the Court with a Proposed Second Amended Complaint. (ECF Nos. 41-1 and 41-2.) After Defendants opposed the motion, Plaintiffs included in their reply papers the Declaration of Olivier Goureau in Support of the Motion to Amend ("Goureau Declaration"). (ECF Nos. 43 and 44.) We write to respectfully request that the Court refuse to consider the Goureau Declaration in resolving Plaintiffs' Motion for Leave to Amend, or in the alternative permit Defendants the opportunity to file a two-page sur-reply memorandum specifically addressing the legal grounds upon which Defendants rely in support of their request.

The Goureau Declaration represents yet another proposed amendment – beyond the proposed Second Amended Complaint – to attempt to assert allegations whose absence, Defendants argue, render the proposed Second Amended Complaint futile. Defendants respectfully submit that it is improper for Plaintiffs to attempt to seek further amendment by way of a reply Declaration. The Court cannot consider affidavits on a motion to amend. *Capitol Records, Inc. v. Mp3tunes, LLC*, 07 Civ. 9931, 2009 U.S. Dist. LEXIS 96521, at *30 (S.D.N.Y. Oct. 16, 2009). It can only consider the sufficiency of the proposed amended pleading. *Id.* As with a motion to dismiss, the court may only consider the facts alleged in the proposed complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint. *Id.*; *Atl. Cas. Ins. Co. v. Coffey*, 11-CV-170S, 2012 U.S. Dist. LEXIS 30960, at *4 (W.D.N.Y. Mar. 8, 2012); *see also Am. S.S. Owners Mut. Prot. & Indem. Ass'n v. Am. Boat Co., LLC*, No. 11 Civ. 6804, 2012 U.S. Dist. LEXIS 21739, at *1 n.1 (S.D.N.Y. Feb. 17, 2012) (Engelmayer, J.).

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Accordingly, Defendants respectfully request that the Court refuse to consider the Goureau Declaration, or in the alternative permit Defendants the opportunity to file a two-page sur-reply memorandum to address this issue.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Grodin", with a large, stylized loop at the end.

Jaclyn H. Grodin

cc: Harold McGuire, Jr., Esq.
Paul D. Sarkozi, Esq.